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91-1517

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DALE M. BREGNARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that two assault and battery convictions could be considered proper predicate offenses for enhancement under the Armed Career Criminal Act 18 U.S.C. Section 924(e)?

2. Did the Court of Appeals err in looking behind the fact of conviction and in considering the particular facts of two assault and battery convictions based on the statements in the presentence report, in light of the fact that there were no jury instructions and the record did not include even the charging documents?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ for Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered December 23, 1991.

REFERENCE TO OPINIONS BY OTHER COURTS

The case below was reported by the United States Court of Appeals for the First Circuit in the case of *United States of America v. Dale M. Bregnard,* No. 91-1381 (December 23, 1991), 951 F.2d 457 (1st Cir. 1991).

STATEMENT OF JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are as follows:

1) The entry of the judgment sought to be reviewed is December 23, 1991;

2) This court has jurisdiction to review the judgment in question by writ of certiorari pursuant to the terms of 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

18 U.S.C. section 922(g):

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. section 924(e):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

(2) As used in this subsection –

(A) the term "serious drug offense" means –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Mass. Gen. L. ch. 265, Section 13A –

Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of corrections or by a fine of not more than five hundred dollars.

Federal Rule of Criminal Procedure 32(C) – Presentence Investigation –

(1) When Made. A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

(2) Report. The report of the presentence investigation shall contain –

(A) [Effective until Dec. 1, 1991. See, also, subd. (c)(2)(A) below.] information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant.

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

STATEMENT OF THE CASE

The Petitioner Dale M. Bregnard pleaded guilty to one count of the possession of a firearm by a convicted felon, 18 U.S.C. Section 922(g)(1). Following his guilty plea, his sentence was enhanced under the provisions of the Armed Career Criminal Act, 18 U.S.C. Section 924(e)(1). Two assault and battery convictions in Massachusetts were among the predicate crimes used as a basis for the enhancement. The defendant contests the utilization of these two convictions.

As reported in the Court of Appeals decision, the government conceded that the Massachusetts statute under which these two convictions were obtained included conduct that did not constitute a violent crime. Slip Opinion at 6, App. at 6-7. The Court of Appeals therefore determined that it would look behind the statute to ascertain whether or not the assault and battery convictions involved crimes which had "as an element

the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. Section 924(e)(2)(B)(i), cited in the Slip Opinion.[1]

I. ARGUMENT

A. INTRODUCTION

The Court of Appeals in this case held that two Massachusetts assault and battery convictions were predicate offenses under 18 U.S.C. section 924(e)(2)(B)(i). In so doing, the opinion of the Court conflicts with the direction of this Court's opinion in *Taylor v. United States,* 110 S.Ct. 2143 (1990) that one begins the analysis of whether or not offenses are predicate offenses by considering the generic definition of the offense. After considering the definition of assault and battery under the Massachusetts statute, the Court of Appeals determined it would look behind the convictions to the facts of the particular crimes by relying on the descriptions of those offenses in the presentence report. This conflicts with *Taylor v. United States* and *United States v. Hendrickson,* 940 F.2d 320 (8th Cir. 1990), *cert. denied* 112 S.Ct. 610, 116 L.Ed 2d 633 (1991). Both hold that one may look behind the fact of

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[1] The government initially alleged that four convictions for violent felonies satisfied the enhancement provisions. The defendant has never contested the utilization of the robbery conviction. On appeal, the Court of Appeals did not consider his objection to the utilization of the breaking and entering conviction because it found the two assault and battery convictions were predicate offenses negating the need to consider whether the crime of breaking and entering was a proper predicate offense. Hence, only the two assault and battery convictions are at issue in this petition for certiorari.

conviction only to the charging papers and jury instructions to determine if an offense has all the elements of a particular crime.

This case and *United States v. Hendrickson* present a clear conflict as to when and how a court may look behind the fact of conviction to determine if a conviction constitutes a predicate offense for purposes of 18 U.S.C. section 924(e)(2)(B). This conflict should be resolved consistently with the teaching of *Taylor v. United States* that only the charging papers and jury instructions may be utilized as a basis for making this determination.

B. THE APPLICATION OF *TAYLOR V. UNITED STATES* TO 18 U.S.C. SECTION 924(e)(2)(B)(i) BY THE COURT OF APPEALS

The Court of Appeals held that in assessing whether or not the two assault and battery convictions were predicate offenses requiring enhancement it was governed by *Taylor v. United States,* 110 S.Ct. 2143 (1990). The petitioner agrees that *Taylor* governs the analysis in this case.

The statute under which the defendant's sentence was enhanced is 18 U.S.C. Section 924(e). Section 1 of the statute provides that if a person has been convicted under 18 U.S.C. Section 922(g) and has three previous convictions for a violent felony or a serious drug offense, the person shall receive an enhanced sentence. Section 2 defines terms. Subsection A defines serious drug offense and that section is irrelevant to this analysis. Subsection B defines violent felony and is critical to this analysis. The term "violent felony" is defined as any crime punishable by imprisonment for a term exceeding one year that

meets either of the criteria of Subsections 1 or 2. There is also a reference to juvenile delinquency adjudications, but that reference is not relevant to this analysis. In Subsection 2, three specific crimes are identified, burglary, arson, and extortion. That section is not relevant to this case. Subsection 1 provides that a crime is a violent crime if it has as an element the use, attempted use, or threatened use of physical force against another. There is no guidance in the statute nor is there explicit guidance in *Taylor v. United States,* however, as to how one determines if a crime fits within the definition of Subsection 1, i.e. it has as an element the use, attempted use, or threatened use of physical force against another.

The Court of Appeals in this case adopted a fairly straightforward, three-step approach. First, the Court looked to the statutory definition of a prior offense. Second, the Court said in a narrow range of cases, it would go beyond the "mere fact of conviction." Third, it went beyond the mere fact of conviction without articulating any standard for having done so. In going behind the conviction to determine whether or not the offenses in question constitute violent felonies, the court relied on the factual narrative provided by the prosecutor in the pre-sentence report. The defense submits that the Court of Appeals decision is erroneous in several respects, each considered below. Two principles have emerged from *Taylor v. United States.* One is that generally speaking a categorical approach rather than a case by case inquiry into the facts of each underlying offense should be utilized in determining whether or not a prior conviction constitutes a predicate crime for enhancement purposes.

The second principle is that one must look to the statutory definition of a crime and see if it "substantially corresponds" to the generic definition. *Taylor v. United States*, 110 S.Ct. at 2160.

The problem with this direction from *Taylor v. United States* is that there is no explicit guidance as to how to apply this formula to a situation such as this one, in which enhancement is sought not on the basis of one of the specifically enumerated crimes in 18 U.S.C. Section 924(e), but on the basis of crimes whose elements trigger the statute's more general clauses. These would be crimes which fit the definition of 18 U.S.C. Section 924(e)(2)(B)(i) and that part of 18 U.S.C. Section 924(e)(2)(B)(ii), which does not identify specific crimes. In this case, Section 924(e)(2)(B)(i) defines violent felony as:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another;

The question that is not precisely answered in *Taylor v. United States* is how to apply its approach to this portion of the enhancement statute.

What is clear is that the approach in *Taylor v. United States* controls application of other portions of the enhancement statute. In deciding the approach to adopt in *Taylor v. United States*, the Court said:

> We think the only plausible interpretation of Section 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.

Taylor v. United States, 110 S.Ct. at 2160. This Court decided that the approach to the question of whether or not a conviction fit within the definition of burglary would be the same as the approach to be used for the rest of the statute. The approach is to look at the conviction, the statutory definition of the conviction, and then determine if that corresponds to the generic definition of the offense.

There is no clear cut way to apply this *Taylor v. United States* approach to this kind of case. The difficulty comes because in this kind of case there is no generic definition of a particular crime from which one may start. In *Taylor v. United States*, one started with the generic definition of burglary. That generic definition was obtained by determining how the term was used in the codes of most states. As a purely practical matter, the Court did this, at least in part, by referencing a treatise on criminal law. *See* W. LaFave & A. Scott, *Substantive Criminal Law* (West 1986).

What one must establish is what the analogue is to the generic definition of burglary for a person charged under 18 U.S.C. Section 924(e)(2)(B)(i). The Court of Appeals simply began with a consideration of the statutory definition of the crime for which the defendant had been convicted. It eschewed consideration of a generic definition of the crime. Yet, for the very same reasons that this Court looked to the generic definition of burglary, it should look to the generic definition of the crimes which are the bases for the enhancement in this case. In *Taylor v. United States*, this Court opined that by the term burglary Congress meant the generic sense "in which the term is now used in the criminal codes of most States." *Taylor v.*

United States, 110 S.Ct. at 2158. When considering other crimes to determine whether or not they should be the basis for enhanced penalties, the starting point should also be the generic definition of the crime.

The defendant submits that the most logical approach is to take the crime a defendant allegedly committed, in this case assault and battery, and look at its generic definition. One obtains that generic definition from the same source that this Court used to obtain the generic definition of burglary in *Taylor v. United States,* to wit, LaFave & Scott, *Substantive Criminal Law.*

LaFave & Scott explain that assault and battery exists as a statutory crime in all American jurisdictions. LaFave & Scott, *Substantive Criminal Law,* Section 7.14, pp. 299-300. They offer the following definitions. Battery is said to require physical injury or offensive touching. Assault requires no physical contact, but may be committed either by an attempted battery or intentional frightening. LaFave & Scott, *Substantive Criminal Law,* Section 7.14 at p. 300.

A battery may include bodily injury but also extends to what are described as offensive touchings such as unwanted sexual contact or spitting into another person's face. LaFave & Scott, *Substantive Criminal Law,* at Section 7.5, pp. 301-302.

A battery need not have the attempted use or threatened use of physical force against another. It may occur as a result of criminal negligence or other unlawful conduct, though there be no intent to injure. LaFave & Scott, *supra,* at Section 7.15, pp. 302-307. They note that a majority of "battery-type" statutes "expressly state that the

crime may be committed by recklessness. . . . " LaFave & Scott, *supra*, at section 7.15, p. 305. They also note that the Model Penal Code allows recklessness to be a basis for criminal liability on a battery charge. *Id.* at 306.

Negligence may clearly be the basis, if it is of a sufficient degree, to form a charge of battery. LaFave & Scott cite to an old Massachusetts case, *Commonwealth v. Hawkins*, 157 Mass. 551, 32 N.E. 862 (1893), for the holding that a reckless shooting would constitute a battery. LaFave & Scott *supra*, at Section 7.15, p. 305, n. 30.

With respect to assault, LaFave & Scott identified two primary definitions of the crime. One is that an assault is an attempt to commit a battery. LaFave & Scott *supra*, at Section 7.16, p. 313. LaFave & Scott also identify a second common definition of assault as an intentional scaring. LaFave & Scott *supra*, at Section 7.16, pp. 315-317. They note that under this definition there is criminal assault if there is an intent to scare the victim, the victim is scared, and there is some conduct by the defendant to cause that fear. This concept of assault is borrowed from the civil concept of assault and LaFave & Scott recognize that it represents a lesser degree of culpability than assault defined in terms of an attempted battery. LaFave & Scott *supra*, at Section 7.16, p. 317. Nevertheless, they note that the view of the majority of states is that the definition of criminal assault includes this concept of assault as intentional scaring. LaFave & Scott *supra* at Section 7.16, p. 317.

This review of the generic definitions of assault and battery shows that it includes conduct that does not have the use, attempted use or a threatened use of physical force against the person of another. It may include negligent conduct, particularly when that conduct rises to the level of recklessness. It may also include the intentional scaring of another person. Clearly, then the generic definition of assault and battery is not covered within the parameters of Section 924(b)(2)(i).

The defendant submits this should be the end of the inquiry since assault and battery as it is defined generically does not fit within the parameters of Section 924(e)(2)(B)(i), an assault and battery conviction should not be permitted to be an offense upon which enhancement is predicated. The approach outlined above fosters a national or uniform approach to this federal criminal legislation. It promotes a view that will make the determination of whether or not a prior offense may serve as a basis for enhancement consistent on a national level. The defendant submits that under this view there is no need to look at the Massachusetts definition of assault and battery.

Even if one does look at Massachusetts law, however, as the Court of Appeals noted, the Massachusetts assault and battery statute under which this defendant was convicted includes conduct that does not constitute a violent crime. Slip Opinion at 6, App. at 6-7. Though the Court of Appeals did not engage in an analysis of what the generic definition of assault and battery was, what is clear is that in considering either the generic definition or the statutory definition in Massachusetts, the crime includes conduct that is not a violent felony under 18 U.S.C. Section

924 (e) (2) (B) (i). This should end the inquiry, except in a very narrow range of cases considered below. Generally speaking, under this analysis an assault and battery conviction would not be sufficient to constitute a violent crime that would be the basis for enhancement. Only if one looks behind the definition, be it a generic or a statutory definition, would there be any possibility of an assault and battery conviction being a violent crime that could be the predicate felony for enhancement under the statute in question.

C. THE EXCEPTION TO THE CATEGORICAL APPROACH

In *Taylor v. United States*, this Court said that a sentencing court could go behind the fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor v. United States*, 110 S.Ct. at 2160. The Court of Appeals in this case simply said that because the Massachusetts definition of assault and battery included conduct that did not constitute a violent crime, the case was one where the court would look beyond the statute to determine whether the assault and battery convictions "involved crimes which had as an element the use, attempted use, or threatened use of physical force against the person or another." 18 U.S.C. Section 924 (e) (2) (b) (1). Slip Opinion at 6, App. at 7. The Court of Appeals never gave any explanation of the basis upon which it was looking behind the definition of assault and battery, except that the definition did not include that of a violent crime. The decision of the Court of Appeals in this case is contrary to

the teachings of *Taylor v. United States* and in direct conflict with the opinion of the Court of Appeals of the Eighth Circuit in *United States v. Hendrickson*, 940 F.2d 320 (8th Cir. 1991). In *Taylor v. United States*, this Court said that the sentencing court could go behind the fact of conviction in a narrow range of cases to wit, those in which a jury had actually been obligated to find all the elements of generic burglary. In *United States v. Hendrickson*, the Eighth Circuit said:

> An offense constitutes burglary for purposes of section 924(e) if its statutory definition substantially corresponds to "generic" burglary or if the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant. *Taylor v. United States*, ___ U.S. ___, 110 S.Ct. 2143, 2160, 109 L.Ed.2d 607 (1990).

United States v. Hendrickson, 940 F.2d at 324.

The teaching in *Taylor v. United States* that one may go behind the fact of conviction only in a case where a jury makes findings is reinforced by the fact that shortly after the above statement, this Court said that the government might be permitted to use a conviction for enhancement purposes "if the indictment or information and jury instructions show that the defendant was charged." *Taylor v. United States*, 110 S.Ct. at 2160.

At least one other court has questioned whether or not it may look behind the conviction in any case where a jury had not made findings. *See United States v. Bermudez*, 744 F.Supp 217, 220-221 (C.D.CA. 1990), questioning whether or not such a particularized approach into the

facts of a case could take place in the context of a guilty plea.

There are sound reasons why one should only rarely be permitted to go behind the fact of conviction. First, such an approach avoids the necessity of fact finding hearings by the sentencing court with respect to whether or not an offense constitutes a predicate offense. The Court may look to the fact of conviction and in those cases in which there has been a charge and conviction accompanied with jury instructions one may look to those facts, but no additional fact finding is required. In the second place, there is increased reliability inherent in any fact finding process that is accompanied by a jury trial. Indeed, sentences based on plea bargaining may often reflect the reality of compromise more than an identification of the elements of a crime to which a person pleaded. Finally, of course, the fact that a conviction may not be used for enhancement purposes does not preclude its use under the federal sentencing guidelines for the purposes of increasing a sentence thereunder, as this Court noted in *Taylor v. United States. Taylor v. United States*, 110 S.Ct. at 2160, n.10.

The defendant specifically argued to the Court of Appeals that the trial court should not have been allowed to go behind the fact of conviction in this case because the convictions in this case were a result of a plea and hence there were no jury instructions or findings by a jury. The Court of Appeals rejected this argument. Instead, it cited the district court's reliance on the presentence report's description of the offenses to conclude the defendant had committed violent felonies. The Court of Appeals correctly noted that the defendant did not object to the

factual narrative in the pre-sentence report, but the petitioner submits it is not clear that this was the basis of the district court's decision.

In any event, Rule 32(c) of the Federal Rules of Criminal Procedures provides that the pre-sentence report shall include certain information about the defendant. This information relates to the following matters: his prior criminal record, his financial condition, the circumstances of his behavior that might be helpful in assessing the sentence to be imposed. In addition, the report is to include information as to how the defendant fits within the sentencing guidelines. Information is also supposed to be provided about the impact upon the victim of the crime. In addition, information about non-prison programs is to be provided, and finally any other information required by the court.

No place in the description of the contents of the pre-sentence investigation set forth in Rule 32(c) is there any statement that part of the purpose ~~of~~ that pre-sentence investigation is to establish the facts of prior convictions to determine whether or not those convictions are sufficient to form a basis for enhancement of the defendant's crime. The Court of Appeals has suggested a new role for the pre-sentence report, for which the rule itself does not provide.

If the pre-sentence report is to be used in the manner suggested by the Court of Appeals, at the very minimum the defendant should be given advance notice of the same. In *Burns v. United States*, 111 S.Ct. 2182 (1991), this Court held that the District Court could not make a departure from the sentencing range established by the

guidelines without first notifying the parties of its intention to depart. At the very minimum, if the district court intends to utilize the presentence report for a purpose outside of the reasons set forth in the rule itself, the defendant must be given notice of that intent by the court so the defendant can file an appropriate response.

The Court of Appeals also opined that the defendant did not assert it was erroneous for the district court to rely on the presentence report. First, the record is not at all clear that this was the basis of the district court's conclusion. There is no explicit statement by the district court that it is relying on the presentence report. Second, the defendant submits the Court of Appeals misconstrued the defendant's position. In this case, the record did not include any evidence as to the statutes under which the defendant was convicted. There was an information charging statement that alleged certain convictions were to be used. There was no evidence introduced at the sentencing hearing. Indeed, this is reflected in the government's ill-fated attempt to supplement the record with certified court files concerning the convictions of the defendant. See Slip Opinion at 7 n.2, App. at 7. Throughout the appellate process, the defendant has objected to the fact that the government never introduced evidence of the convictions which are supposed to be the basis for the enhancement of his penalty.

In addition, the defendant clearly argued on appeal that *Taylor v. United States* precluded looking behind the fact of conviction except in those cases in which there was a charge and jury instructions. In this case, none of those materials were introduced into evidence, and hence, the

defendant argued the court was precluded from looking behind the fact of conviction.

CONCLUSION

For the reasons set forth above, petitioner respectfully urges that this Court grant certiorari to determine whether the actions of the Court of Appeals for the First Circuit as set forth were in error.

Dated: March 20, 1992.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 91-1381

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

DALE M. BREGNARD,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Francis J. Boyle, *U.S. District Judge*]

Before

Breyer, *Chief Judge*,

Torruella, *Circuit Judge*,

and Woodlock,* *District Judge*.

Robert B. Mann, with whom *Mann & Mitchell*, was on brief for appellant.

Margaret E. Curran, Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney and *Edwin J. Gale*, Assistant United States Attorney, were on brief for appellee.

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* Of the District of Massachusetts, sitting by designation.

December 23, 1991

TORRUELLA, *Circuit Judge*. Dale Bregnard pled guilty to one count of violating 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by a convicted felon. Because Bregnard had at least three prior convictions for violent felonies, the government sought to enhance his sentence under the provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). The district court found that Bregnard had sufficient predicate crimes for the § 924(e) enhancement and therefore, it sentenced Bregnard to fifteen years without parole, followed by a three-year term of supervised release. Bregnard appeals and we affirm.

I

On December 31, 1989, the police of Warren, Rhode Island received an anonymous tip that a man fitting Bregnard's description was at a bar in possession of a firearm. The police went to the bar and when they frisked Bregnard, they found a fully loaded, nine millimeter, semi-automatic pistol in a shoulder holster concealed beneath his jacket.

On January 30, 1990, Bregnard was indicted by a federal grand jury in the District of Rhode Island. The one-count indictment charged him with being a convicted felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). On May 15, 1990, the government filed an information charging that the defendant had four prior

convictions for violent felonies and therefore qualified as an "armed career" criminal, subject to the enhancement provision of 18 U.S.C. § 924(e). The convictions used by the government were: (1) robbery in 1974; (2) breaking and entering in the night time with intent to commit larceny in 1974; (3) assault and battery in 1976; and (4) assault and battery in 1985.

Prior to sentencing, Bregnard filed a motion to dismiss the indictment and a supplemental motion in which he argued, among other things, that two of the predicate offenses – the breaking and entering conviction and the assault and battery convictions – were not within the purview of the § 924(e) enhancement. At sentencing, the district court relied on the presentence report to find that the two assault and battery convictions constituted predicate crimes for the § 924(e) enhancement because both offenses involved the threat or use of physical force on another. Although the district court judge did not specifically rule on whether the breaking and entering conviction was a proper predicate for the enhancement, he suggested that *United States v. Patterson*, 882 F.2d 595 (1st Cir. 1989), *cert. denied*, 493 U.S. 1027 (1990), foreclosed the issue and Bregnard's argument to the contrary.

On appeal, Bregnard raises two issues. First, he argues that the district court erred in finding that the government had proved three prior violent felonies as required under the provision of the enhancement statute, 18 U.S.C. § 924(e).[1] Second, he claims that the

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[1] Bregnard does not contest that the robbery conviction constitutes a predicate felony for the § 924(e) enhancement.

enhancement of his sentence on the basis of state convictions labeled misdemeanors by the state, but punishable by a maximum term of more than two years imprisonment, is contrary to *Taylor v. United States,* 110 S. Ct. 2143 (1990), and amounts to a denial of the equal protection of the law.

II

The sentencing enhancement provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e) provides that:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

Violent felony as used in section 924(e) is defined as

> any crime punishable by imprisonment for a term exceeding one year, . . . that –
>
> (i) has an an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

Bregnard has never disputed that he has been convicted as alleged in the information filed by the government. More importantly, Bregnard has never objected to the descriptions of his criminal conduct in the presentence report. His claim is that the breaking and entering conviction and the two assault and battery convictions are not proper predicate crimes for the § 924(e) enhancement. Because we find that the two assault and battery convictions constitute predicate crimes under § 924(e) – which together with the robbery conviction constitute three convictions as required for the § 924(e) enhancement – we need not consider Bregnard's challenge to the district court's use of the breaking and entering conviction.

THE ASSAULT AND BATTERY CONVICTIONS

Bregnard alleges that his two assault and battery convictions cannot be considered proper predicate offenses for enhancement because they are not convictions for a crime involving the use, attempted use, or threatened use of physical force against another. 18 U.S.C. § 924(e)(2)(B)(i). Bregnard suggests that under *Taylor v. United States*, 110 S. Ct. 2143 (1990), the assault and battery offenses for which he was convicted do not constitute "violent felonies."

In *Taylor*, the defendant pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C.

§ 922(g)(1). The defendant had four prior convictions, including two for second-degree burglary under Missouri law. Pursuant to 18 U.S.C. § 924(e), the government sought a sentence enhancement. The Supreme Court held that when Congress listed "burglary" as a violent felony under § 924(e), it intended to include a crime that has the basic elements of a "generic" burglary – i.e., an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. Since some of the Missouri statutes defining second-degree burglary did not include all the elements of generic burglary, and it was unclear under which of Missouri's second-degree burglary statutes the defendant was convicted, the Supreme Court remanded the case.

Although *Taylor* involved the analysis of a crime specifically listed in § 924(e)(ii), the Supreme Court adopted a formal categorical approach applicable to the entire enhancement statute. Under this categorical approach, the sentencing court examines "the statutory definitions of the prior offenses, and not . . . the particular facts underlying those convictions." 110 S. Ct. at 2159. However, in a narrow range of cases, the sentencing court goes beyond the "mere fact of conviction" to the charging papers or jury instructions to determine whether the prior offense is a violent felony under § 924(e). *Id.* at 2160.

Both of Bregnard's assault and battery convictions were under Mass. Gen. L. ch. 265, § 13A, which provides that "[w]hoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years." The government concedes that the Massachusetts assault and battery statute includes conduct that does not constitute a violent

crime. Therefore, this is a case where the court must look beyond the statute to determine whether the assault and battery convictions involved crimes which had "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The district court relied on the presentence report's, description of the offenses to conclude that Bregnard had committed three previous violent felonies.[2] Bregnard did not object to the factual narrative of his prior convictions,[3] nor has he asserted that it was erroneous for the district court to rely on the presentence report. Time and again we have held that facts stated in presentence reports are deemed admitted if they are not challenged in the district court. *See, e.g., United States v. Dietz*, ___ F.2d ___, ___ (1st Cir. No. 91-1321, Nov. 27, 1991) slip op. at 12-13; *United States v. Wilkinson*, 926 F.2d 22, 29 (1st Cir.), *cert. denied*, 111 S. Ct. 2813 (1991). *Cf. United States v.*

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[2] Because the presentence report is sufficient basis to support the government's position in this appeal we are not required to address the government's motion to supplement the record with certified court files regarding appellant's convictions. We note, however, that the government's effort to supplement the record in this fashion is contrary to normal appellate practice. "[W]e are not at liberty to consider the new [material]. It was not before the District Court for h[is] determination. It can play no part in ours." *United States v. Pacheco-Ortiz*, 889 F.2d 301, 307 n.3 (1st Cir. 1989).

[3] He was given an opportunity to challenge the descriptions pursuant to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure.

Payton, 918 F.2d 54, 56 (8th Cir. 1990) (holding that defendant's admission at sentencing hearing that he had committed generic burglary coupled with the description in the information of the conviction for burglary was sufficient to find generic burglary under *Taylor*).

The presentence report relates that on July 8, 1976, Bregnard pled guilty to assaulting one Jeffrey Hayden with intent to cause physical harm and injury. He received an eleven month sentence. On January 28, 1984, Bregnard and an accomplice waited for Wilfred Cameron as he was leaving his home. When Cameron attempted to resist, Bregnard and his companion assaulted him. Bregnard was charged with assault and battery and larceny. Although the larceny count was not prosecuted because the victim recanted his testimony on that count, Bregnard pled guilty to the assault and battery charge and received a one year suspended sentence. These facts, underlying both convictions for assault and battery, leave no doubt that Bregnard's conduct "ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Congress' intent in enacting the sentencing enhancement provision of the Armed Career Criminal Act was to strengthen the law enforcement efforts of the states by enhancing the punishment of "career" offenders. *Taylor v. United States*, 110 S. Ct. at 2149. The presentence report demonstrates that Bregnard is not a casual offender. His criminal history is extensive, dating back to 1969 and ranging from convictions for possession of stolen goods, forgery, extortion, intimidation of witness, larceny and various drug related offenses to being charged with breaking and entering at nighttime, assault and battery

on a police officer, threatening burglary, conspiracy to commit armed robbery, sodomy and other violent criminal conduct. In sum, Bregnard's criminal history displays the attributes which Congress considered before branding someone a "career" criminal.

III

Bregnard makes two final arguments. First, citing *Taylor,* Bregnard asserts that because Massachusetts has labelled his assault and battery convictions as misdemeanors, they may not be characterized as violent felonies for purposes of the section 924(e) enhancement. But, as Bregnard concedes,[4] *Taylor* upholds the principle that the construction of federal laws – i.e., the enhancement statute – is not dependent upon state law.

The felony component of the term "violent felony" in section 924(e) is defined in 18 U.S.C. § 921(a)(20) to exclude "any State offense classified by the State as a misdemeanor and punishable by a term of imprisonment of two years or less." Since Bregnard's assault and battery convictions carry a maximum term of "greater than two years," they are "violent felonies" as that term is defined in section 924(e).

Bregnard's final argument is similarly unconvincing. He asserts that a person is denied equal protection of the law when the enhancement of his sentence is dependent upon whether or not he committed two misdemeanor offenses in Massachusetts or its neighboring state, Rhode

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[4] Brief of Appellant at 36.

Island. Bregnard, however, does not claim that Massachusetts had no rational basis for providing a two and a half year term of incarceration for the crime of assault and battery. *See, e.g., Rummel v. Estelle,* 445 U.S. 263, 284 (1980). Nor has he claimed that Congress had no rational basis for defining "violent felony" under § 924(e) to include offenses that may be labelled as misdemeanors by state law, but are punishable by imprisonment "greater than two years."

The mere fact that application of the § 924(e) enhancement is ultimately predicated on the definition of crimes that may vary from state to state is insufficient to conclude that § 924(e) violates the equal protection of the law. It is beyond dispute that as long as Congress does not use an invidious or suspect classification, it has broad power under the commerce clause to define the class of criminals to whom the enhancement statute applies. *See, e.g., United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976). As the Ninth Circuit stated in upholding the predecessor of § 922 (18 U.S.C. § 1202 (prohibiting receipt of firearms by convicted felons)) against an equal protection challenge:

> It was entirely rational for Congress to conclude that its primary source of reference should be the maximum permissible punishment under the applicable law, and that this statutory scheme would provide a well-defined and uniform guideline to determine which persons should be subject to [the penalty of the statute].

Id.

The judgment of the district court is ***affirmed.***

Supreme Court, U.S.
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No. 91-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

DALE M. BREGNARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior convictions for assault and battery qualified as "violent felon[ies]" for purposes of sentence enhancement under 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 951 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1991. The petition for a writ of certiorari was filed on March 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the District of Rhode Island, petitioner was convicted of illegally possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g)(1).

He was sentenced to 15 years' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. Police officers arrested petitioner at a bar in Warren, Rhode Island, after they found a fully loaded, nine-millimeter, semi-automatic pistol concealed in a shoulder holster beneath petitioner's jacket. A federal grand jury subsequently returned an indictment charging petitioner with illegally possessing a firearm after a felony conviction. 18 U.S.C. 922(g)(1). The government later filed an information charging that petitioner had four prior convictions for violent felonies and therefore qualified for sentence enhancement under 18 U.S.C. 924(e).[1] The government pointed to petitioner's 1974 robbery conviction, his 1974 nighttime breaking and entering conviction, and his 1976 and 1985 assault and battery convictions. Pet. App. 2-3.[2]

Before sentencing, petitioner filed a motion arguing that three of the predicate convictions—the two

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[1] Section 924(e)(1) provides that if a person who violates Section 922(g) has three previous "violent felony" convictions, he shall be subject to a mandatory minimum 15-year sentence. 18 U.S.C. 924(e)(1). Section 924(e)(2)(B) defines a "violent felony" to include any crime punishable by imprisonment for a term exceeding one year that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) * * * involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B).

[2] Petitioner had pleaded guilty to assault and battery charges under a Massachusetts statute providing that "[w]hoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of corrections or by a fine of not more than five hundred dollars." Mass. Ann. Laws ch. 265, § 13A (Law. Co-op. 1980). See Pet. App. 6.

assault and battery convictions and the breaking and entering conviction—did not constitute "violent felon[ies]" within the meaning of Section 924(e). At sentencing, the district court relied on the descriptions of the assault and battery offenses in the presentence report to find that those offenses qualified as violent felonies. The presentence report indicated that each involved a threat or use of physical force on another. Pet. App. 3, 8.[3]

2. The court of appeals affirmed the district court's decision. The court of appeals recognized that the Massachusetts courts have construed the relevant assault and battery statute, Mass. Ann. Laws ch. 265, § 13A (Law. Co-op. 1980), to cover both physically harmful touchings and offensive nonconsensual touchings involving no risk of physical harm. See *Commonwealth* v. *Burke*, 457 N.E.2d 622, 624 (Mass. 1983). The court of appeals accordingly concluded that one "must look beyond the statute to determine whether the assault and battery convictions involved crimes which had 'as an element the use, attempted use, or threatened use of physical force against the person of another.' " Pet. App. 7, quoting 18 U.S.C. 924(e)(2)(B)(i).

The court of appeals reviewed the presentence report's account of the assault and battery convictions, observing that petitioner had not objected in the district court "to the factual narrative of his prior con-

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[3] Although the court did not specifically rule on whether the breaking and entering conviction qualified as a violent felony, it suggested that the issue was foreclosed by *United States* v. *Patterson*, 882 F.2d 595 (1st Cir. 1989), cert. denied, 493 U.S. 1027 (1990), which held that the relevant state statute, Mass. Ann. Laws ch. 266, § 16 (Law. Co-op. 1980), defined a predicate crime for purposes of Section 924(e). See Pet. App. 3.

victions" and had not "asserted that it was erroneous for the district court to rely on the presentence report." Pet. App. 7. The court of appeals concluded that the facts set forth in the presentence report "le[ft] no doubt" that petitioner's convictions "ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another," within the meaning of Section 924(e)(2)(B)(i). Pet. App. 8.[4]

ARGUMENT

Petitioner contends that his prior convictions for assault and battery do not qualify as "violent felon[ies]" within the meaning of 18 U.S.C. 924(e)(2)(B), and that his sentence therefore should not have been enhanced. The court of appeals correctly rejected that contention.

This Court concluded in *Taylor* v. *United States*, 495 U.S. 575 (1990), that sentencing courts should generally determine whether a particular offense is a violent felony for purposes of Section 924(e) by examining only "the fact of conviction and the statutory definition of the prior offense." 495 U.S. at 602. The Court indicated, however, that sentencing courts may look beyond those criteria when the statutory definition of the prior offense includes both violent and nonviolent conduct and it is therefore not possible to determine from the fact of conviction whether the prior offense involved violence. *Ibid.* The Court used the example of a state burglary statute that proscribed both breaking into an automobile (which

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[4] The court did not consider petitioner's challenge to the use of the breaking and entering conviction to enhance his sentence, because the two assault and battery convictions, coupled with the robbery conviction, were sufficient to justify the sentence enhancement. Pet. App. 5.

would not constitute a violent felony) and breaking into a building (which would constitute a violent felony). *Ibid.* The Court stated that, in such a case, the sentencing court could properly consult the charging documents and jury instructions to ascertain whether the defendant "was charged only with a burglary of a building," and whether "the jury necessarily had to find an entry of a building to convict." *Ibid.*

As the court of appeals recognized, this case presents a situation in which the sentencing court must look beyond the fact of conviction and the statutory definition of the prior offense to determine whether the prior offense qualifies as a violent felony. Pet. App. 7. In construing the Massachusetts assault and battery statute, the Supreme Judicial Court of Massachusetts has stated that there are two kinds of battery: touchings committed with such violence that bodily harm is likely to result; and nonviolent but offensive touchings that affront the victim's personal integrity. *Commonwealth* v. *Burke*, 457 N.E.2d 622, 624-625 (1983). With respect to the first kind of touching, "consent thereto is immaterial." *Id.* at 624. With respect to nonviolent battery, however, lack of consent is essential, since "an offensive touching is so only because of lack of consent." *Ibid.* Accordingly, under Massachusetts law, assault and battery may be proved by showing that "the touching was physically harmful," that "the touching was "potentially physically harmful," or that "the touching was nonconsensual." *Id.* at 625. Because physically or potentially physically harmful batteries satisfy Section 924(e)'s definition of "violent felony" and offensive nonconsensual batteries do not, it was necessary for the courts below to look beyond the statutory definition to

determine what kind of assault and battery was involved in petitioner's convictions.

Petitioner argues, Pet. 16-17, that sentencing courts should not look beyond the fact of conviction and the statutory definition in cases in which the conviction for a prior offense was based on a guilty plea, because of the unavailability of jury instructions showing that the jury found the element of violence. The courts of appeals have rejected that argument. See, *e.g.*, *United States* v. *Sweeten*, 933 F.2d 765, 771-772 (9th Cir. 1991) (per curiam); *United States* v. *Taylor*, 932 F.2d 703, 708 (8th Cir. 1991); *United States* v. *Garza*, 921 F.2d 59, 61 (5th Cir.), cert. denied, 112 S. Ct. 91 (1991). Such an approach would frustrate Congress's purpose in enhancing the sentences of armed career criminals by precluding the use of prior convictions in many cases in which the convictions resulted from a guilty plea or bench trial. See *Taylor*, 932 F.2d at 708.

Petitioner further argues, Pet. 18-19, that, even if the district court was entitled to look beyond the fact of conviction and the statutory definition, it should not have relied on the information contained in the presentence report. Petitioner failed to argue either at sentencing or on appeal, however, that sentencing courts may not consult the presentence report. See Pet. App. 7. Accordingly, petitioner has waived that claim. In any event, petitioner is mistaken in contending that a sentencing court may consult only the charging papers and jury instructions in determining the character of a prior conviction. Although this Court's decision in *Taylor* referred only to those sources, the decision does not prohibit the use of other documentation, such as a presentence report, that "does not require any searching inquiry into the underlying facts of a defendant's conviction."

Sweeten, 933 F.2d at 769.[5] Here, the presentence report clearly showed, and petitioner did not contest, that petitioner's previous convictions were for violent batteries.[6] Thus, no "searching inquiry" into the underlying facts of those convictions was necessary.

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[5] Petitioner mistakenly relies on *United States* v. *Hendrickson*, 940 F.2d 320 (8th Cir. 1991), as conflicting authority. The court held in that case that an offense constitutes "burglary" within the meaning of Section 924(e)(2)(B)(ii) "if [the] statutory definition [of the offense] substantially corresponds to 'generic' burglary or if the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." 940 F.2d at 324. The *Hendrickson* decision, like *Taylor*, does not address the propriety of consulting documents other than the charging papers and jury instructions to determine if a prior offense could be used for sentence enhancement under Section 924(e).

[6] Petitioner argues, Pet. 18-19, that he lacked notice that the information in the presentence report concerning his prior convictions would be used to enhance his sentence. As the court of appeals explained, Fed. R. Crim. P. 32(c)(2)(A) provided adequate notice. See Pet. App. 7 n.3. That Rule states that the presentence report shall contain information regarding the defendant's "prior criminal record * * * that may be helpful in imposing sentence." In any event, petitioner has not contested the accuracy of the information about his prior convictions contained in the presentence report.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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